

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

JAN 12 2006

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

**BRENTLEY COATES, individually and
on behalf of a class of all other persons
similarly situated,**

Plaintiff - Appellant,

v.

**AGILENT TECHNOLOGIES, INC.;
AGILENT TECHNOLOGIES, INC.
DEFERRED PROFIT-SHARING
PLAN; HEWLETT-PACKARD
COMPANY; HEWLETT-PACKARD
COMPANY DEFERRED PROFIT-
SHARING PLAN,**

Defendants - Appellees.

No. 03-17306

D.C. No. CV-03-00498-RMW

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Ronald M. Whyte, District Judge, Presiding

Argued and Submitted October 18, 2005
San Francisco, California

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Before: **KOZINSKI** and **FERNANDEZ**, Circuit Judges, and **HATTER** **,
District Judge.

Defendants had discretion in their role as plan sponsor to merge Fund B into Fund A. “[A]n employer’s decision to amend a pension plan concerns the composition or design of the plan itself and does not implicate the employer’s fiduciary duties which consist of such actions as administration of the plan’s assets.” Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 444 (1999).

Defendants did not breach their fiduciary duties when they followed the express terms of the plan and merged the two funds. See Wright v. Oregon Metallurgical Corp., 360 F.3d 1090, 1093 (9th Cir. 2004). Defendants’ duties ran to the plan as a whole, not to any subset of beneficiaries, because fiduciaries are required “to take impartial account of the interests of all beneficiaries.” Varity Corp. v. Howe, 516 U.S. 489, 514 (1996); see 29 C.F.R. § 2550.404a-1 (describing fiduciary’s duties in reference to the plan as a whole). Plaintiff concedes that the merged fund was properly invested in a diversified investment portfolio, so he failed to state a claim for breach of fiduciary duty.

** The Honorable Terry J. Hatter, Jr., Senior United States District Judge for the Central District of California, sitting by designation.

Plaintiff did not argue his misrepresentation claim in his opening brief. We therefore decline to consider it. See Fed. R. App. P. 28(a)(9)(A); Kim v. Kang, 154 F.3d 996, 1000 (9th Cir. 1998) (“[W]e ‘will not ordinarily consider matters on appeal that are not specifically and distinctly argued in appellant’s opening brief.’” (quoting United States v. Ullah, 976 F.2d 509, 514 (9th Cir. 1992) (citation and internal quotation marks omitted))).

AFFIRMED.